FILE COPY

FILED
SEP 11 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946

No. 490

AMERICAN LECITHIN COMPANY, INC.,
Petitioner,

v.

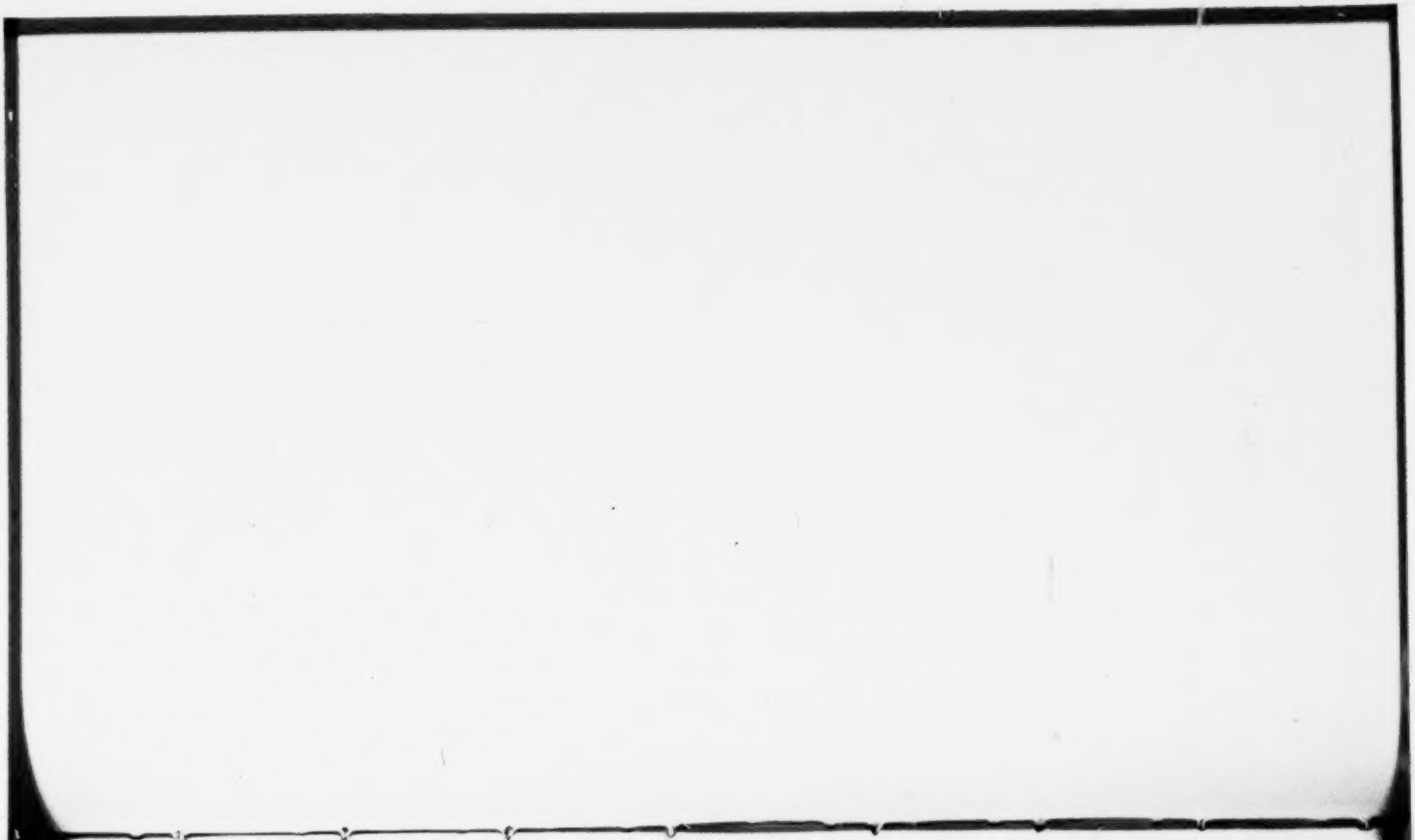
PAUL V. McNUTT, as Federal Security Administrator of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

BAER & MARKS,
Attorneys for Petitioner,
20 Exchange Place,
New York 5, New York.

DONALD MARKS,
MAX BENJAMIN,
of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49



INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI:

Statement of Proceedings in Court Below 1

Statement of Opinion Below 2

Jurisdiction 3

Summary Statement of Matter Involved 3

Principal Questions Presented 4

Statute and Orders Involved 5

Reasons for Granting Writ of Certiorari 5

Conclusion 6

Verification 7

BRIEF IN SUPPORT OF PETITION:

Opinion of Court Below 2, 9

Jurisdiction 3, 9

Statement of the Case 3, 9

Specification of Errors 9

AUTHORITIES AND ARGUMENT:

Point I—The Court below should not have dismissed the petition upon a construction of the order dehors the record 10

Point II—On the construction of the order adopted below, the Court erred in holding that petitioner is not adversely affected by the order and therefore has no standing to seek review thereof 12

Point III—As a matter of law, the Administrator exceeded his authority in those portions of the order complained of by petitioner 16

Appendix 18

Table of Cases

PAGE

A. E. Staley Mfg Co. v. Secretary of Agriculture, et al., 120 Fed. (2d) 258 (C. C. A. 7) 12, 14

Associated Industries v. Ickes, 134 Fed. (2d) 694, (C. C. A. 2) 14

Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470 14

Jacob Siegel Co. v. Federal Trade Commission, 90 L. Ed. 697 15

Land O'Lakes Creameries Inc. v. McNutt, 132 Fed. (2d) 653 (C. C. A. 8) 12, 13, 14

U. S. Cane Sugars Refiners' Ass'n, et al. v. McNutt, 138 Fed. (2d) 116 (C. C. A. 2) 12, 13

Statutes Cited

Federal Food, Drug and Cosmetic Act (June 25, 1938, c. 675, 52 Stat. 1040)

Section 401 .....1, 5, 16
Section 403 .....1, 5, 16
Section 701 .....1, 2, 3, 5, 13, 18

Judicial Code

Section 240 .....3, 18

21 U. S. Code

Part 14 of Title 21, Chapter I 2
Section 341 .....1, 5, 16
Section 343 .....1, 5, 16
Section 371 .....1, 2, 3, 5, 13, 18

28 U. S. Code

Section 347 .....3, 18

PAGE

Miscellaneous

F. R. Dec. 6, 1944 ..... 2, 4, 5
F. R. Doc. 44—18393—9 F. R. 14329 ..... 2, 4, 5
Sec. 14.6(a)(3) 10, 17
" 14.6(e)(2) 10
" 14.7(a)(3) 10, 17
" 14.7(c)(2) 10
" 14.8 10
" 14.9 10
" 14.10 10
" 14.11 10
" 14.12 10

Supreme Court of the United States

OCTOBER TERM, 1946

No.

AMERICAN LECITHIN COMPANY, INC.,
Petitioner,

v.

PAUL V. McNUTT, as Federal Security Administrator of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The above-named petitioner, by the undersigned, its attorneys, respectfully prays that a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit may issue to review the judgment of that Court made on the 14th day of June, 1946, in the above-mentioned cause.

Statement of Proceedings in Court Below

This cause arose under the provisions of Sections 401, 403 and 701 of the Federal Food, Drug and Cosmetic Act (June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. Sections 341, 343 and 371), hereinafter referred to as the "Act".

Petitioner, on February 10th, 1945, filed with the United States Circuit Court of Appeals for the Second Circuit a petition for judicial review of an order of the Federal Security Administrator dated December 4, 1944, published December 6, 1944, promulgating regulations fixing and establishing definitions and standards of identity for cacao products (F. R. Doc. 44-18393, 9 F. R. 14329). These regulations were issued as Part 14 of Title 21, Chapter I of the U. S. Code. The petition for review was filed pursuant to Section 701(f)(1) of the Act (21 U. S. C. Sec. 371(f)(1)).

On June 14th, 1946, the United States Circuit Court of Appeals for the Second Circuit rendered its decision dismissing the petition for lack of jurisdiction, holding that the aforesaid order does not "adversely affect" the petitioner.

Statement of Opinion Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet officially reported. A copy thereof is set forth at length in the Record (Tr., pp. 207-209). The denial that petitioner is "adversely affected" is based on a construction by respondent of his own order, which construction the Court below adopted, though it is no part of the record. This construction is to the effect that, although the order prescribes the designation of lecithin as an ingredient in cacao products by the words "Emulsifier Added" or "With Added Emulsifier" (Tr., pp. 18, 20), this does not constitute a prohibition against the addition of the word "lecithin" if users so wish (See opinion below, Tr., p. 208). Upon this premise the Court held that any adverse effect of the order upon petitioner was too remote and indirect to give petitioner standing to review the order.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on June 14, 1946. The jurisdiction of this Court is invoked under Section 701(f)(4) of the Federal Food, Drug and Cosmetic Act (21 U. S. C. Sec. 371(f)(4)) and Section 240 of the Judicial Code (28 U. S. C., Sec. 347). Both Sections are set forth in the Appendix.

Summary Statement of Matter Involved

Petitioner, American Lecithin Company, Inc., is a corporation duly created and existing under the laws of the State of Ohio, duly qualified to do business in the State of New York, and with its principal place of business in the State of New York at Elmhurst, Long Island, in the City of New York, County of Queens, within the Second Circuit of the United States Circuit Court of Appeals. Respondent, Paul V. McNutt, was the Federal Security Administrator of the United States who, acting by Watson B. Miller, as acting Federal Security Administrator, issued the aforesaid order, fixing and establishing definitions and standards of identity for cacao products.

Petitioner owns patents covering processes for the extraction and refining of lecithin which is used in the manufacture of chocolate products. Petitioner licenses the use of such processes and sells lecithin for use in the manufacture of chocolate products. Respondent's aforesaid order permits the use of lecithin as an optional ingredient in such products. However, when so used, respondent's aforesaid order requires the label to bear the statement "Emulsifier Added" or "With Added Emulsifier". Petitioner seeks to have lecithin labeled as "lecithin", this being its common and usual name.

The controversy tests the power of respondent under the statute to require designation of an optional ingredi-

ent by some word other than its usual or common name. Respondent has directed the designation of the optional ingredient lecithin by a word which is intended to be descriptive of its function. Petitioner claims that even as to function the word selected, namely "emulsifier", is false and misleading. Beyond this, however, petitioner claims that respondent has exceeded his authority in selecting other than the usual and common name of the ingredient.

Copies of the findings of fact, paragraphs and provisions of said order relating to petitioner's product lecithin will be found in the Record (Tr., pp. 15-21).

Principal Questions Presented

1. Did the Circuit Court of Appeals properly refuse jurisdiction on a "construction" of the order by respondent dehors the record?

2. Did the Circuit Court of Appeals, on the construction of the order which it adopted, properly hold that petitioner is not adversely affected by the order and therefore has no standing to seek review thereof?

3. In view of the statutory requirement that optional ingredients be designated by their common and usual names, and the fact that the record shows without contradiction that lecithin is the common and usual name of petitioner's product, did the Circuit Court of Appeals properly hold that the requirement of the order that the word "emulsifier" be used to designate the presence of lecithin as an optional ingredient did not constitute an appropriate basis for review of the order upon petitioner's application?

4. Did the Circuit Court of Appeals properly hold that the adverse effect of respondent's order upon petitioner is too remote and indirect to give petitioner standing to review the order?

5. Under the Act, does a party to the proceedings before the Administrator have standing to review the Administrator's order when the effect thereof is to subject the party to increased competition and to impair the good will inherent in the usual and common name of his product by depriving him of the required use of that name by users of his product?

Statute and Orders Involved

Pertinent excerpts from the Federal Food, Drug and Cosmetic Act will be found in the Record (Tr., pp. 2-4) and in the Appendix. Pertinent excerpts from respondent's order, the judicial review of which was denied for lack of jurisdiction, are set forth in the Record (Tr., pp. 15-21). The full text of respondent's order is set forth in the Record (Tr., pp. 151-151-I).

Reasons for Granting Writ of Certiorari

The principal questions presented, as stated above, involve several important principles in the field of administrative law, justifying the granting of a writ of certiorari.

In acting upon a construction of the Administrator which it termed "reasonable", the Court below ousted itself of jurisdiction upon a construction of the order dehors the record. The so-called construction of the order actually amounted to amendment; but whatever it was, it was done without public announcement and by mere statement in the Government's brief and argument before the Court. For the Court below to oust itself of jurisdiction upon such a basis presents grave questions. May an administrative officer cut off judicial review of his orders by a process of verbal adjustment to the exigencies of litigation as it arises? Should the Courts accept "construction" or "amendment" which softens or parries the impact of the order upon the complainant who challenges its validity?

In addition, the decision below raises serious questions of divergence between Circuit Courts of Appeal as to what constitutes a party "adversely affected" and thus having standing to review an administrative order. The divergence of rule calls for an authoritative decision by this Court.

A further question of importance involves the illegality of the action of the Administrator in having ordered the designation of lecithin as an optional ingredient in chocolate products by the use of a word other than its usual and common name. This presents an important question of construction of the Food, Drug and Cosmetic Act.

These reasons for the granting of the petition will be amplified in a supporting brief.

Conclusion

For the reasons indicated above, as elaborated in the brief annexed hereto, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit may be reversed, and that your petitioner may have such further and other relief as this Court may deem proper in the premises.

Dated, New York, N. Y., September 9th, 1946.

Respectfully submitted,

BAER & MARKS,
Attorneys for Petitioner,
By: DONALD MARKS.

DONALD MARKS,
MAX BENJAMIN,
Of Counsel.

STATE OF NEW YORK, }
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK, }

DONALD MARKS, being first duly sworn, deposes and says: that he is a member of the law firm of Baer & Marks, maintaining offices at 20 Exchange Place, Manhattan Borough, City and State of New York; that he is a member of the bar of the Supreme Court of the United States and is an attorney for American Lecithin Company, Inc., which was the Petitioner in the proceedings before the United States Circuit Court of Appeals for the Second Circuit in the above entitled matter; that he makes this verification on behalf of American Lecithin Company, Inc., as Petitioner herein; that affiant has read the foregoing petition, was the attorney for said Petitioner, American Lecithin Company, Inc., and has knowledge of this litigation; that the matters stated in said petition are true to the best of his knowledge, information and belief; that the foregoing petition is well founded and entitled to the favorable consideration of this Court and that it is not interposed for the purpose of delay.

DONALD MARKS.

Subscribed and sworn to before me
this 10th day of September, 1946.

BESS TURNER
Notary Public, Kings County
Kings Co. Clk's No. 104, Reg. No. 195T8
N. Y. Co. Clk's No. 408, Reg. No. 324T8
Commission Expires March 30, 1948

Supreme Court of the United States

OCTOBER TERM, 1946

No.

AMERICAN LECITHIN COMPANY, INC.,
Petitioner,

v.

PAUL V. McNUTT, as Federal Security Administrator of the United States,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below, Jurisdiction, Statement of the Case

A statement of the opinion below, a statement concerning the jurisdiction of this Court and a summary statement of the matter involved appears at pages 2-4 hereof and accordingly is not here repeated.

Specification of Errors to Be Urged

It is submitted that the United States Circuit Court of Appeals for the Second Circuit erred:

1. In dismissing the petition for judicial review upon a construction of respondent's order dehors the record.

2. In holding that petitioner is not adversely affected by respondent's order and, therefore, has no standing to seek review thereof.

Authorities and Argument

POINT I

The Court below should not have dismissed the petition upon a construction of the order dehors the record.

The order specifically names lecithin as a permissible optional ingredient in various types of chocolate products (Sections 14.6 (a)(3); 14.7 (a)(3); 14.8; 14.9; 14.10; 14.11; 14.12; Tr., pp. 17, 19, 20 and 21). The order then provides that when lecithin is used "the label shall bear the statement "Emulsifier Added" or "With Added Emulsifier" (Section 14.6 (e)(2) and 14.7 (c)(2), Tr., pp. 18 and 20).

There is nothing in the record to indicate, or justify the assumption by the Court below, that the order permits the label to read "Emulsifier Lecithin Added" or "With Added Emulsifier Lecithin". Yet that is the specific premise upon which the Court below acted in refusing jurisdiction (Tr., p. 208).

The Court in this connection stated:

> "We accept this reasonable construction by the Administrator of his own order and shall decide the question of jurisdiction on this basis."

Such a complete change in the terms of the order scarcely comes within the scope of "construction". It alters the plain and mandatory words, making them no longer exclusive in import. But whether this constitutes amendment or interpretation, it is done without public announcement and dehors the record.

The danger of the Court's acceptance of this alteration of the order lies in the fact that neither the present Administrator nor any future Administrator is bound by

the construction upon which this case has been decided. The case having been so decided, the order remains beyond challenge, since time has now run against any challenge of the terms of the order. (Sec. 701(f)(1); 52 Stat. 1055; Title 21 U. S. C. Sec. 371).

Thus, an administrative officer, by his own say-so, has succeeded in ousting the Courts of jurisdiction to review his order in an important respect and has thus rendered the order inviolable against future attack. If the same Administrator, or some successor, should see fit to adopt a different view of the order, there would be no public record binding him to the present interpretation and there would be no one to challenge the new construction in any event.

This is administrative irresponsibility run riot. To say that we have a government of laws and not of men under such circumstances is to adopt too sanguine a view of the administrative process. It is one thing to give great weight to administrative findings because they are presumably the result of expert judgment. It is quite another thing to hold that an administrative officer may compel abdication by the Courts by an unrecorded construction of his order which the Courts see fit to adopt as "reasonable" and thus as a basis for a denial of jurisdiction.

The relative unimportance of the particular issue in this proceeding is lost in the gravity of the principle involved. The record here shows a specific labeling requirement laid down by respondent. On the basis of that requirement, petitioner is plainly "adversely affected" and entitled to standing to review the order. The petition for judicial review should have been entertained on that basis and the order reviewed on its merits.

POINT II

On the construction of the order adopted below, the Court erred in holding that petitioner is not adversely affected by the order and therefore has no standing to seek review thereof.

The Court below applied its own ruling in

> *U. S. Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 Fed. (2d) 116,

distinguishing that ruling from the decisions in

> *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 Fed. (2d) 258 (C. C. A. 7); and
> *Land O'Lakes Creameries Inc.* v. *McNutt*, 132 Fed. (2d) 635 (C. C. A. 8).

(Tr., p. 209.)

The question of what constitutes a party "adversely affected", having standing to review an administrative order, has become one of prime importance in the administration of the law. The decisions of the several Circuit Courts of Appeal on this subject are at variance both in their reasoning and results.

This Court has not yet had occasion to pass directly upon the question here presented. In a matter of such public importance and involving divergent views of Circuit Courts of Appeal, this Court should indicate the correct rule as a guide in the ever-increasing mass of litigation arising out of administrative orders.

A brief summary of the *Staley, Land O'Lakes* and *U. S. Cane Sugar Refiners'* cases will serve to state the problem.

In the *Staley* case, the petitioner sought to set aside an order of the Secretary of Agriculture promulgating a regulation fixing and establishing a definition and standard of identity for sweetened condensed milk, pursuant to

Section 701 (f)(1) of the Act (21 U. S. C., Sec. 371 (f)(1)). The order did not permit use of corn syrup as a saccharine ingredient in sweetened condensed milk. Petitioner appealed as to this aspect of the order, claiming its invalidity on several grounds. Respondent contended that the petition should be dismissed for lack of jurisdiction on the ground that petitioner was not engaged in the sale of sweetened condensed milk, but in the manufacture and sale of corn syrup, and therefore was not adversely affected by the order. The Circuit Court of Appeals, for the 7th Circuit, found, however, that the exclusion of petitioner's product as a saccharine ingredient gave petitioner standing to review the order.

In the *Land O'Lakes Creameries* case, the order of the Administrator established standards of identity for oleomargarine. Petitioners were in the butter business. Petitioners claimed that the standardization of the use of optional ingredients in oleomargarine impaired petitioners' competitive position, and thus adversely affected them. The Administrator argued that petitioners had no standing to review the order on the ground that those engaged in the butter industry were not directly or adversely affected. The Circuit Court of Appeals for the 8th Circuit held, nevertheless, that petitioners were parties "adversely affected" and that the Court therefore had jurisdiction to review the order.

In the *U. S. Cane Sugar Refiners'* case, petitioners were cane sugar producers who objected to an order which permitted fruit canners to use dextrose and corn syrup as optional ingredients without having so to state on the labels. Petitioners, as in the *Land O'Lakes* case, argued that their position as cane sugar producers was jeopardized and that their product was put in keener competition with dextrose and corn syrup because of the order. The Circuit Court of Appeals for the Second Circuit held (as in this case) that the effect of the order was too remote and indirect to give petitioner standing to review the order.

On the other hand, the Circuit Court of Appeals for the Second Circuit in

Associated Industries v. *Ickes*, 134 Fed. (2d) 694

held that a consumer whose sole economic injury lay in the effect of lessened competition among producers of soft coal had a sufficiently direct and substantial interest to give him the status of a person "adversely affected" and therefore standing to appeal.

This Court has reached the same result under the Federal Communications Act in

Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U. S. 470

where it was held that an existing licensee claiming economic injury as a result of the increased competition from the granting of another license had standing as a person "adversely affected".

On the construction of the order adopted by the Court below, the labeling provisions do not prohibit the use of the word "lecithin" on labels, but do require the use of the term "emulsifier". Apart from the question of validity of this requirement under the language of the Act, it is obvious that few, if any, users of lecithin will go beyond the minimum requirements of the order in their labeling provisions. Thus, even though the order, in the eyes of the Court below, does not touch the manner in which petitioner's business shall be conducted (Tr., p. 208), it does adversely affect petitioner in the general use of the name of its product. Petitioner's good will, built up at great expense and over a substantial period of time, is thus directly jeopardized. To hold that such an order does not directly or adversely affect petitioner is unrealistic. Certainly, within the meaning of the *Staley* case, the *Land O'Lakes* case, the *Associated Industries* v. *Ickes* and *Federal Communications Commission* v. *Sanders* cases, *supra*, petitioner is adversely affected by the order and has standing to review it.

It may be noted in passing that the decision of this Court in

Siegel Co. v. *Federal Trade Commission,* 90 L. Ed. 697,

has relevance to the case at bar. In that case, this Court had occasion to say that in the field of administrative action, the punishment should fit the crime. Here we have another instance of an administrative order which cuts deep into petitioner's business through its effect upon the use of the name of its product. In the *Siegel* case this Court took note of the value of a name to a business man. Petitioner's right to the general and unrestricted use of the name of its product by its customers is just as surely violated by the order here involved as was the right of the petitioner in the *Siegel* case. There is no more reason shown in the record for this action of the Administrator than was found in the *Siegel* case. Yet the Court below has not only said that petitioner is not damaged but has made this the basis for ousting itself of jurisdiction.

Both on the ground of divergence of rulings by the several Circuit Courts of Appeal and on the ground of the public importance of the principle involved, this Court should grant the writ of certiorari. This conclusion is reinforced by considerations of substantial justice to petitioner in the light of the holding of this Court in the *Siegel* case.

POINT III

As a matter of law, the Administrator exceeded his authority in those portions of the order complained of by petitioner.

Petitioner does not propose to argue the merits of the case in its petition for a writ of certiorari or in its supporting brief. However, it is pertinent to indicate that there is a substantial basis for petitioner's application to review the order on its merits.

The Act in Section 401 (21 U. S. C. Sec. 341) authorizes the Administrator to promulgate regulations "fixing and establishing for any food, under its common or usual name as far as practicable, a reasonable definition and standard of identity * * *" The Act then provides that the Administrator shall designate the optional ingredients which shall be "named" on the label.

In Section 403 (21 U. S. C. Sec. 343), the Act prohibits as "misbranding" the labeling of a food product by any name other than that prescribed in the definition and standard "* * * and, insofar as may be required by such regulations, the common names of optional ingredients * * *".

The record is quite clear in this case that lecithin is the common and usual name of petitioner's product. The Government did not contend otherwise below.

The word "emulsifier" is plainly not a name but is a word descriptive of function. There was some difference of opinion disclosed in the record as to whether lecithin does or does not have emulsifying qualities; but the evidence was overwhelming that in its use in chocolate products, lecithin does not act as an emulsifier. Therefore, the word "emulsifier" not only fails to qualify as the common and usual name of petitioner's product, but is not even correct as a description of function.

Under these circumstances, it is plain that respondent exceeded his powers and authority under the Act in prescribing the use of the word "emulsifier" to designate the presence of lecithin as an optional ingredient. It is significant that respondent, in Sections 14.6 (a)(3) and 14.7 (a)(3) of his order, refers to petitioner's product by the name "lecithin" (Tr., pp. 151F and 151G). It should also be noted that respondent himself, in the proposed order, set forth in the notice of public hearings, provided for labeling by use of the word "lecithin" (Tr., pp. 32, 33, 34, 35, 36 and 37). Why respondent chose to cover the presence of lecithin in chocolate products by use of the word "emulsifier" does not appear on the face of the record. Regardless of motive, however, it is submitted that the action of respondent was invalid under the Act.

Much more might be said with respect to the evidence and findings to demonstrate that the action of respondent lacks the support of substantial evidence and is arbitrary and unreasonable. That, however, would only expand this brief to unreasonable lengths. It is sufficient to rest upon the illegality of the administrative action and the error of the Court below in refusing jurisdiction to review that order.

A writ of certiorari should be granted herein.

Dated, New York, N. Y., September 9th, 1946.

Respectfully submitted,

BAER & MARKS,
Attorneys for Petitioner,
By: DONALD MARKS.

DONALD MARKS,
MAX BENJAMIN,
of Counsel.

APPENDIX

Pertinent Excerpts From Statutes and Regulations Involved

SECTION 701 (f) (4) of the Federal Food, Drug and Cosmetic Act (June 25, 1938, c. 675)—21 U. S. C. Sec. 371 (f) (4):

"(f) *Review of Order*

• • •

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended."

SECTION 240 of the Judicial Code (28 U. S. C., Sec. 347):

"*Certiorari to circuit courts of appeals and United States Court of Appeals for District of Columbia; appeal to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.*

(a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."